A **MALAYSIAN AIRLINE SYSTEM BHD**

v.

TAM CHIN SIONG & ORS

B HIGH COURT MALAYA, JOHOR BAHRU
MOHD ZAWAWI SALLEH JC
[CIVIL APPEAL NO: MT(3) 12-46-2008]
1 JULY 2009

C ***CIVIL PROCEDURE:*** *Damages - Assessment - Quantum of damages awarded - Whether proper - Whether damages arose from a breach of contract - Whether respondents underwent profound distress and anxiety due to appellant's failure to honour contract - Whether quantum of damages awarded reasonable and appropriate*

D This was an appeal by the appellant against the decision of the Sessions Court judge after a full trial awarding the defendants the sum of RM15,000 for general damages. The appellant's appeal was on quantum of damages only. Briefly, the respondents had bought six return flight tickets of the appellant for a flight from Malaysia E to Melbourne, Australia. The respondents had specifically reserved seats which were at the front of the aircraft because they were sensitive to the engine noise and had to pay a premium for the said reservation. However, on the date of the flight, they were issued with boarding passes for seats at the back of the aircraft. F The respondents immediately protested and made complaints to the relevant persons in charge. According to the respondents, they were shoved around the airport and misled into accepting the boarding passes for the seats at the back of the aircraft. Due to this, their flight had been unpleasant and the ill effects of their G experience spilled over into their holiday and they did not enjoy the holiday. Therefore, the respondents claimed that they should be compensated for the distress, discomfort and for the spoilt holiday on the ground of breach of contract. The appellant appealed and submitted that (i) the respondents had not proven H that he and his family had suffered stress and their holiday was spoilt; (ii) the Sessions Court judge's award of RM15,000 was so extremely high in the circumstances of the case; (iii) the respondents did not prove the RM30,000 that SP1 said they had spent and the respondents would have spent the said sum anyway I whether or not they suffered as a result of the appellant's breach.

Held (dismissing the appeal):

(1) SP1 had explained in detail the troubles he and his family were put through by the appellant. SP1 was not cross examined on any of this aspect of evidence. If the appellant had doubted the evidence, then it should have cross examined him in detail. But it did not do so. Even in their submission in the Sessions Court, they did not doubt SP1's evidence. Therefore, SP1's evidence was deemed to be accepted without any question by the appellant. The appellant could not question SP1's evidence in this appeal, as he was the best person to answer any questions on the stress he and his family went through. Any question should have been put to him at the trial. Further, it was not disputed that the respondents had booked their flight in advance and specifically booked the seats so that they would have an enjoyable flight and holiday as a family. But the appellant breached the contract and put the respondents through a lot of trouble. For sure, the respondents underwent profound distress, anxiety, inconvenience and loss of refreshing and memorable holiday. (paras 11 & 13)

(2) The damages suffered by the respondents arose directly from the failure of the appellant to honour their contract/agreement to reserve the seats booked by the respondents. The failure and/or negligence in not giving their reserved seats was a breach of contract with them and this had resulted in frustration, embarrassment, mental and physical distress, inconvenience and loss of memorable holiday. The damages, therefore, were recoverable. The quantum of damages awarded by the learned judge was modest, reasonable and appropriate in the circumstances of the case. Further, the onus of demonstrating that the award was so 'extremely high or so very small as to make it, in the judgment of this court an entirely erroneous estimate of the damage to which the plaintiff is entitled' squarely lay on the appellant. The appellant must avail tangible evidence to this court in order to discharge that burden. With respect, the appellant had failed to do so. (paras 18, 21 & 22)

(3) It was not unreasonable to say that a holiday to Melbourne for six people for eight days would cost RM30,000. Once again, the appellant did not cross examine SP1 on this aspect

of evidence. If SP1 had been asked how he had arrived at his figure, he would have told the appellant. But they chose not to do so and it was therefore deemed to be admitted. (para 24)

(4) When we buy a plane ticket, that ticket technically was a contract between us and the airline. The airline had an obligation to get us and our luggage in as timely and as safely as possible to our destination. We, as the purchaser, also had certain rights, as for being guaranteed to be given our reserved seats, being protected in the event of a flight delay or cancellation, or in the event of the airline losing our luggage. (para 26)

Case(s) referred to:

Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors & Another Case [1995] 3 CLJ 639 CA ***(refd)***

Bailey v. Bullock [1950] 2 All ER 1167 ***(refd)***

Browne v. Dunn [1983] 6 R 67 ***(refd)***

Flint v. Lorell [1935] 1 KB 345 ***(refd)***

Harris v. Thompson Bros [1956] NZL R 995 ***(refd)***

Hayes v. Dodd [1990] 2 All ER 815 CA ***(refd)***

Hobbs v. London and South Western Railway Company [1875] LR 10 QB ***(refd)***

Jackson v. Chrysler Acceptance Ltd [1978] RT R 474 ***(refd)***

Jackson v. Horizon Holiday Ltd [1975] 1 WLR 1468 ***(refd)***

Jarvis v. Swans Tours Ltd [1973] QB 233 ***(refd)***

Subramaniam Paramasivam & Ors v. Malaysian Airline System Bhd [2002] 1 CLJ 230 HC ***(refd)***

Watts v. Morrow [1991] 1 WLR 1421 ***(refd)***

For the appellant - Azlina Md Yusof; M/s Abdullah & Zainudin
For the respondents - Tamil Selvam; M/s CS Tam & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Mohd Zawawi Salleh JC:

[1] This is an appeal by the appellant against the decision of the learned Sessions Court judge, after a full trial, awarding the defendants the sum of RM15,000 for general damages. The appellant's appeal is on quantum of damages only.

The Background Facts

[2] The respondents had bought six return flight tickets of the appellant on 15 November 2003. The flight was from Malaysia to Melbourne, Australia. The respondents were going to Melbourne for a holiday. The seats numbered 24J, 24K, 25J, 26J and 26K were reserved to them for the flight to Melbourne. The respondents had specifically reserved these seats, which were at the front of the aircraft because they were sensitive to the engine noise. They had to pay a premium for this reservation. The tickets were issued and seats were reserved.

[3] However, on the date of the flight on 18 November 2003, when they checked in at Senai Airport, Johor Bahru, for the connecting flight to Kuala Lumpur International Airport (KLIA), they were issued with boarding passes for seat numbered 36 onward that were at the back of the aircraft. These were the seats that they specifically wanted to avoid and that were the reason for their reservation earlier.

[4] The 1st respondent immediately protested to the person in charge who advised him to deal with the ticketing counter at KLIA. So they boarded the flight to KLIA.

[5] When they approached the ticketing counter in KLIA, they were again issued with boarding passes with seats in row 36. When they complained that their reserved seating was for seats numbered 24J, 24K, 25K, 26J and 26K, the ticketing officer referred them to one Miss Adeline, who was at a different ticketing counter. Miss Adeline could not restore their reserved seats as they have been given to others passengers and boarding passes had been issued to those passengers. Her explanation was that the "system has been compromised".

[6] Miss Adeline then referred them to one Mr. Wong, who was the manager on duty. The respondents told Mr. Wong that they will not board the flight unless the reserved seats are restored to them because of their sensitivity to the noise and that will cause them great distress and discomfort to travel at the back of the flight or be seated anywhere near the engine. Mr. Wong then advised the respondents to proceed to the boarding lounge first as "there were a lot of people at the immigration counter". Mr. Wong assured them that he will sort out the problem at the boarding lounge.

[7] When the respondents went to the boarding lounge and enquired about Mr. Wong and their seating, they were informed by a lady staff that Mr. Wong did not contact her about the respondent's seating or come to the boarding lounge to sort out the matter as he had promised. The lady staff told them that the seats will not be restored to them and asked them to accept the seats numbered 35 to 36.

[8] According to the respondents, they were shoved around the airport and misled into accepting the boarding passes for seats numbered 35 & 36. As a result of all the running around, they had to have their fast food dinner on the floor of the boarding lounge. This caused them great embarrassment and their holiday was spoilt from the start. Further, their flight was the most unpleasant. The ill effects of their experience spilled over into their holiday and they did not enjoy the holiday.

[9] Therefore, the respondents claimed that they should be compensated for the distress, discomfort and for the spoilt holiday on the ground of breach of contract.

The Appeal

[10] The first ground of appeal is that the respondents have not proven that he and his family suffered stress and their holiday was spoilt. Learned counsel for the appellant submits that there was no witnesses called to support SP1's testimony and no medical report was produced.

[11] With respect, this court disagrees. In his witness statement (see pp. 56 – 60 of the Record of Appeal), SP1 explained in detail the troubles he and his family were put through by the appellant. The answers to question two to ten were on the treatment meted out to him and his family by the appellant's staffs. SP1 was not cross-examined on any of this aspect of evidence. If the Appellant had doubted the evidence, then it should have cross-examined him in detail. But it did not do so. Even in their submission in the Sessions Court, they did not doubt SP1's evidence. Therefore, his evidence is deemed to be accepted without any question by the appellant. In the case of *Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors & Another Case* [1995] 3 CLJ 639, the Court of Appeal held that it is essential that a party's case be put to his opponent's material witnesses when they are under cross-examination. A failure in this aspect may be treated as an

abandonment of the pleaded case and if a party, in the absence of valid reasons, refrains from doing so, then he may be barred from raising it in argument. (See also *Browne v. Dunn* [1983] 6 R 67). In my judgment, the appellant cannot question SP1's evidence in this appeal, as he is the best person to answer any questions on the stress he and his family went through. Any question should have been put to him at the trial.

[12] Further, in *Subramaniam Paramasivam & Ors v Malaysian Airline System Bhd* [2002] 1 CLJ 230, Kang Hwee Gee J (as he then was) explained what is meant by "prove":

held:

> [8] The claimant must prove his loss. "Prove" means to provide some form of evidence sufficient to convince the decider to the point that he believes it to exist or considers its existence so probable that a prudent man ought, under the circumstance of the particular case, act on the supposition that it exists ... .

[13] It was not disputed that the respondents had booked their flight in advance and specifically booked the seats so that they will have an enjoyable flight and holiday as a family. But the appellant breached the contract and put the respondents through a lot of trouble. For sure, the respondents underwent profound distress, anxiety, inconvenience and loss of refreshing and memorable holiday.

[14] The second ground of appeal is that the learned Sessions Court judge's award of RM15,000 was so extremely high in the circumstances of the case. In support of her argument, learned counsel for the appellant cited the case of *Hobbs v. London and South Western Railway Company* [1875] LR 10 QB, where Mellor J said:

> I quite agree with my brother Parry, that for the mere inconvenience, such as annoyance and loss of temper, or vexation, or for being disappointed in a particular thing which you have set your mind upon, without real physical inconvenience resulting, you cannot recover damages. That is purely sentimental, and a case where the word inconvenience, as I here use, would apply, but I must say, if it is a fact that you arrived at a place where you did not intend to go to, where you are placed by reason of the breach of the contract of the carriers at a considerable distance from your destination the case may be otherwise.

[15] With respect, this court disagrees. This is not a minor imperfection on the part of the appellant. The respondents were sensitive to flight noise and they had specifically reserved seats numbered 24J, 24K, 25J, 25K, 26J and 26K. However, on 18 January 2003, upon checking at the Senai Airport, they were issued with boarding passes for their flight to Melbourne *via* Kuala Lumpur with seats in row 36, which is at the rear of the economy class. Their reserved seats had been given to other passengers. The respondents complained to the appellant's staffs but what they got was the run around. They had only time enough to have a McDonald's dinner seated on the floor of the boarding lounge. The respondents felt cheated and humiliated by the appellant and its staffs. They had unpleasant and sleepness night from Kuala Lumpur to Melbourne. Their holiday got off to a disappointingly bad start. This has resulted in frustration, embarrassment, mental and physical distress and great inconvenience for the respondents.

[16] It is settled law that normally, no damages in contract will be awarded for injury to the plaintiff's feelings, or for his mental distress, anguish, annoyance, loss of reputation or social discredit caused by the breach of contract (see *Bailey v. Bullock* [1950] 2 All ER 1167; Last - *Harris v. Thompson Bros* [1956] NZL R 995; *Hayes v. Dodd* [1990] 2 All ER 815 CA; and *Watts v. Morrow* [1991] 1 WLR 1421 CA). However, the court of Appeal in United Kingdom has allowed an exception to this principle: in the case of a failure, in breach of contract, to provide a holiday of the advertised standard or some other form of entertainment or enjoyment, damages can be awarded for the disappointment and mental distress caused by the breach of contract (see - *Jarvis v. Swans Tours Ltd* [1973] QB 233; *Jackson v. Horizon Holiday Ltd* [1975] 1 WLR 1468; *Jackson v. Chrysler Acceptance Ltd* [1978] RT R 474).

[17] In *Jarris v. Swans Tours Ltd (supra)*, the plaintiff had booked a winter sports holiday to Switzerland on the strength of the defendant tour company's lavishly illustrated travel brochure, only to discover that the great time promised did not materialise. Many facilities that the defendant promised would be provided did not exist as a result of which the plaintiff suffered disappointment, distress annoyance and frustration. The *ratio* for allowing the plaintiff's claim appears in the following passage of the speech of Edmund Davis LJ at p. 239 of the judgment:

If in such circumstances travel agents fail to provide a holiday of the contracted quality, they are liable in damages. In assessing those damages the court is not, in my judgment, restricted by the 63.45 pound paid by the client for his holiday. Nor is it confined to matters of physical inconvenience and discomfort, or even to quantifying the difference between such items as he expected delicious Swiss cakes and the depressingly desiccated biscuits and crisps provided for tea, between the ski-pack ordered and the iniature skis supplied, nor between the "very good … house party arrangements" assured and the lone wolf second week of the unfortunate plaintiff's stay. The court is entitled, and indeed bound, to contrast the overall quality of the holiday so enticingly promised with that which the defendants in fact provided.

In determining what would be proper compensation for the defendants' marked failure to fulfil their undertaking I am of the opinion that, again to use Mellor J's terms (LR 10 QB 111, 122), "vexation" and "being disappointed in a particular thing you have set your mind upon" are relevant considerations which afford the court a guide in arriving at a proper figure.

When a man has paid for and properly expects an invigorating and amusing holiday and, through no fault of his, returns home dejected because his expectations have been largely unfulfilled, in my judgment it would be quite wrong to say that his disappointment must find no reflection in the damages to be awarded. And it is right to add that, in the course of his helpful submissions, Mr. Thompson did not go so far as to submit anything of the kind. Judge Alun Pugh took that view in *Feldman v. Allways Travel Service* [1957] CLY 934. That, too, was a holiday case. The highly experienced senior county court judge there held that the correct measure of damages was the difference between the price paid and the value of the holiday in fact furnished, "taking into account the plaintiff's feelings of annoyance and frustration."

The trial judge clearly failed to approach his task in this way, which in my judgment is the proper way to be adopted in the present case. He said:

> There is no evidence of inconvenience or discomfort, other than that arising out of the breach of contract and covered by my award. There was no evidence of physical discomfort, eg, bedroom not up to standard.

His failure is manisfested, not only by these words, but also by the extremely small damages he awarded, calculated, be it noted, as one half of the cost of the holiday. Instead of "a great time," the plaintiff's reasonable and proper hopes were largely and

A lamentably unfulfilled. To arrive at a proper compensation for the defendants' failure is no easy matter. But in my judgment we should not be compensating the plaintiff excessively were we to award him the 125 pound damages proposed by Lord Denrnng MR. I therefore concur in allowing this appeal.".

B **[18]** So too here. The damages suffered by the respondents arose directly from the failure of the appellant to honour their contract/ agreement to reserve the seats booked by the respondents. The failure and/or negligence in not giving their reserved seats is a breach of contract with them and this has resulted frustration, C embarrassment, mental and physical distress, inconvenience and loss of memorable holiday. The damages, therefore, are recoverable.

[19] In determining the quantum of damages in this instant case, D the learned Sessions Court judge had this to say:

ii. Di dalam penyataan tuntutannya, plaintif-plaintif menuntut untuk gantirugi am bagi kemungkiran kontrak, atau di alternatifnya dan juga gantirugi am. Di dalam keterangannya plaintif pertama memaklumkan kepada Mahkamah bahawa E akibat dari perbuatan defendan, plaintif-plaintif merasakan:

- great embarrassment
- spoilt and did not enjoy the holiday
F - distress and discomfort.

iii. Di dalam penghujahannya, peguam plaintif memohon Mahkamah membenarkan sejumlah RM30,000.00 untuk kehilangan percutian dan telah meminta Mahkamah menetapkan satu tarikh untuk menaksirkan kerugian.

G

iv. Setelah mengkaji keseluruhan keterangan yang ada, Mahkamah memutuskan gantirugi sebanyak RM15,000.00 adalah jumlah yang munasabah, berpatutan dan wajar kepada semua plaintif di dalam kes ini. Ini juga mengambil kira permasalahan-permasalahan yang plaintif-plaintif telah alami.

H

[20] In *Flint v. Lorell* [1935] 1 KB 345, Greer LJ said at p. 360:

The Court will be disinclined to reverse the finding of a trial Judge as to the amount of damages merely because they think that if I they had tried the case in the first instance they would have given a lesser sum. In order to justify reversing the trial judge on the question of the amount of damages, it will generally be necessary that this Court should be convinced either that the judge acted

upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgement of this Court an entirely erroneous estimate of the damage to which the Plaintiff is entitled.

[21] This court agrees that embarrassment, inconvenience, mental and physical distress, loss of refreshing and memorable holiday with family are not easily quantifiable. If we look at the grounds of judgment, we can see that the learned sessions judge only give RM15,000 as damages because, in his considered opinion, the respondent's troubles were not distraught enough ('tidak sesuatu yang besar') to award a bigger sum. Therefore, it follows that if the learned judge had found the respondents troubles to be more serious, then, he would have most certainly ordered a bigger quantum of damages. In my opinion, the quantum of damages awarded by the learned judge was modest, reasonable and appropriate in the circumstances of the case.

[22] It must be appreciated that the onus of demonstrating that the award was so "extremely high or so very small as to make it, in the judgment of this court an entirely erroneous estimate of the damage to which the plaintiff is entitled" squarely lie on the appellant. The appellant must avail tangible evidence to this court in order to discharge that burden. With respect, the appellant has failed to do so.

[23] The third and fourth grounds of appeal can be considered together. The complaint here is that the respondents did not prove the RM30,000 that SP1 said they had spent and the respondents would have spend the said sum anyway whether or not they suffered as a result of the appellant's breach.

[24] In my judgment, it is not unreasonable to say that a holiday to Melbourne for six people for eight days would cost RM30,000 (see p. 64 of the Record of Appeal). The respondents had booked into the Crown Towers Hotel in Melbourne. Once again the appellant did not cross-examined SP1 on this aspect of evidence. If SP1 had been asked how he had arrived at his figure, he would have told the appellant. But they choose not to do so and it is therefore deemed to be admitted.

[25] It should be noted that at the trial, the appellant's case and its cross-examination centered solely on the question of liability. The appellant did not question the respondents evidence on quantum because they were arguing that they do not have to honour their contract/agreement to reserve the seats booked by the respondents. It is only on appeal that they are attacking the damages awarded.

[26] In conclusion, I must say that when we buy a plane ticket, that ticket is technically a contract between us and the airline. The airline has an obligation to get us and our luggage in as timely and as safely as possible to our destination. We, as the purchaser, also have certain rights, as for being guaranteed to be given our reserved seats, being protected in the event of a flight delay or cancellation, or in the event of the airline losing our luggage. (See, *Dickerson, Flight Delays: Rights, Remedies, Damages & Class Actions, International Travel Law Journal*, Issue Two, Spring, 2000.).

[27] For the reasons above stated I would dismiss this appeal with costs.